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Appeal Suit No.418 of 2016

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Judgment Reserved on : 29.11.2022

Judgment Delivered on : **19.12.2022**

CORAM :

THE HON'BLE MR.JUSTICE D.BHARATHA CHAKRAVARTHY

Appeal Suit No.418 of 2016

and

C.M.P.No.16367 of 2022

Kumaravel

... Appellant

Versus

1.A.Sadiq Batcha

2.K.P.Shanmugam

3.K.Shakira Begum

... Respondents

Appeal Suit is filed under Section 96 of the Code of Civil Procedure, 1908, against the Judgment and Decree dated 12.02.2016 made in O.S.No.59 of 2013, on the file of the II-Additional District and Sessions Court, Erode.

For Appellant : Mr.M.Guruprasad

For Respondents : Mr.J.Titus Enock,
for Mr.I.C.Vasudevan (for R2)

: Mr.K.S.Jeya Ganeshan (for R3)

JUDGMENT

A.The Appeal :

This Appeal Suit is filed against the Judgment and Decree in

O.S.No.59 of 2013, passed by the II-Additional District and Session Judge,



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Erode, in and by which, the suit filed by the plaintiff for specific performance of the suit agreement was decreed by refusing the prayer for specific performance and granting the alternative relief to repay the sum of Rs.14,96,267/- with interest at the rate of 9% per annum from the date of suit, till the date of Decree, and thereafter, at the rate of 6% per annum, on the advance amount of Rs.12,00,000/-, until repayment.

B.The Case of the Plaintiff:

2. The suit property absolutely belongs to the first defendant, having purchased the same through a registered Sale Deed, dated 21.01.2010. The defendant entered into an agreement of sale with the plaintiff on 27.02.2011, agreeing to sell the suit property to the plaintiff for a sum of Rs.15,00,000/-, and received a sum of Rs.7,00,000/-, as advance. At the time of agreement, the first defendant had represented that he has created a mortgage by depositing the original title deed with one *S.C.Manickkam*, by borrowing a sum of Rs.3,00,000/-. Again the first defendant, approached the plaintiff and persuaded him to pay another sum of Rs.5,00,000/-, so as to clear the existing mortgage. On 11.04.2011, the plaintiff paid a further sum of Rs.5,00,000/-, and the time for performance of the agreement was extended by 15 months from that date. A due endorsement was also made



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on the rear side of the agreement, dated 27.02.2011. Thereafter, even though the plaintiff was ready and willing to perform his part of the contract, colluding with the second defendant, the first defendant executed a Power of Attorney on 21.04.2011 in favour of the second defendant and in turn, the second defendant created a sham and nominal document purporting to be a Sale Deed on 29.11.2011, thereby, selling the property to the third defendant. The first defendant also had filed an Insolvency Petition in I.P.No.5 of 2012, and the plaintiff had also taken steps to implead himself as a party in the Insolvency proceedings before the II-Additional Sub-Court, Erode. Therefore, the plaintiff passed a pre-suit notice on 14.06.2002, thereafter, the suit in O.S.No.59 of 2013, was filed for specific performance.

C.The Case of the Defendants :

3. The suit was resisted by the second defendant by filing a written statement by denying all the allegations and submitting that the first defendant executed a registered Power of Attorney, in favour of the second defendant to sell the suit property, which was registered as Document No.657 of 2011, on the file of the Sub-Registrar, Erode, on 21.04.2011. Pursuant to the said lawful power, the property was sold to the third



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defendant for a sum of Rs.7,00,000/-. On 29.11.2011, the same was registered as Document No.7742 of 2011, thereafter, the possession was delivered to the third defendant.

3.1 The third defendant filed a separate written statement, again denying the allegations and reiterating that pursuant to the lawful power, the defendant purchased the suit property and that she was a *bona-fide* purchaser for value and as such purchase of the suit property was in good faith. She had no knowledge about the alleged sale agreement between the plaintiff and the first defendant.

D. The Issues & The Trial:

4. On the strength of the said pleadings, the Trial Court framed the following issues:-

“1) Whether the plaintiff is entitled for specific performance based on the sale agreement dated 27.02.2011?

2) Whether the plaintiff was always ready and willing to perform his part of contract?

3) Whether the plaintiff is entitled to get relief of declaration in respect of the sale deed dated 29.11.2011 executed by the 2nd defendant in favour of the 3rd defendant ?



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4) *Whether the 3rd defendant is the bonafide purchaser ?*

5) *Whether the plaintiff is entitled to get the alternative relief from the from the 1st defendant by way of repayment of Rs.14,96,267/- with subsequent interest at the rate of 12% p.a., on Rs.12,00,000/- from the date of the suit?*

6) *Whether the plaintiff is entitled to get the relief of creating charge over the suit properties?*

7) *What other relief if any, the plaintiff is entitled to?"*

4.1 On the said issues, the parties let in evidence. The plaintiff examined himself as P.W.1, one *Senthil Kumar* and one *Ravindran* were examined as P.W.2 & P.W.3 and ***Exs.A-1 to A-13*** were also marked, on behalf of the plaintiff. The second defendant examined himself as D.W.1 and the husband of the third defendant examined himself as D.W.2, and one *Matheswaran* was examined as D.W.3 and ***Exs.B-1 to B-21*** were marked, on behalf of the defendants.

E. The Findings of the Trial Court :

5. Thereafter, the Trial Court proceeded to consider the case of the parties by a Judgment dated 12.02.2016, and found that when P.W.1. had

<https://www.mhc.tn.gov.in/cases> reasoned that the construction was incomplete at the time of entering into



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an agreement as plastering works were going on, and therefore, 15 months time was fixed for concluding the sale, the agreement did not specifically say so, therefore, that aspect is suspicious. The Trial Court, further considered the fact, as per the case of the plaintiff, that the first defendant had promised to clear the loan and hand over the original title deed to the plaintiff. They further pleaded that only the mortgage deed alone was handed over and that the defendant represented that he has misplaced the original sale deed, thus raising the question of the genuineness of the agreement.

5.1. Moreover, the claim of the plaintiff having advanced a sum of Rs.12,00,000/-, without even getting the original sale deed in favour of the first defendant also raises doubt. When there are so m of doubts regarding the suit sale agreement, the plaintiff will not be entitled for the relief of specific performance. But the first defendant, who had received the sum of Rs.12,00,000/- remained *ex-parte*, and did not contest the said claim and therefore the plaintiff will be entitled for the alternative relief of repayment of the advance amount with interest. The Trial Court also further held that the plaintiff was not ready and willing to perform his part of the contract and the third defendant is a *bonafide* purchaser, as the suit sale agreement



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is an unregistered sale agreement and he had no occasion to know about the same, and accordingly, passed the Decree for the prayer of alternative relief. Aggrieved by the same, the plaintiff has filed the present Appeal Suit before this Court.

F.The Submissions:

6. Heard, *Mr.Guruprasad*, learned Counsel for the Appellant and *Mr.J.Titus Enock*, for *Mr.I.C.Vasudevan*, learned Counsel for the second respondent and *Mr.K.S.Jeya Ganeshan*, learned Counsel for the third respondent.

6.1 *Mr.Guruprasad*, learned Counsel for the Appellant taking this Court through the pleadings and the evidence on record would submit that it is only the first defendant, who can contest the suit sale agreement. The second defendant is only a Power of Attorney agent, and the third defendant is only a subsequent purchaser. As a matter of fact, they have clearly deposed that they had no knowledge about the transactions, prior to the execution of the Power of Attorney in their favour. The learned Counsel firstly would submit that when the suit property was agreed to be sold for a total sale consideration of Rs.15,00,000/-, and when the plaintiff had paid



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a sum of Rs.12,00,000/- as advance, selling the property for only a sum of Rs,7,00,000/-, by the second defendant to the third defendant by itself would adumbrate that the transaction was sham and nominal.

6.2. As far as the plaintiff is concerned, it can be seen that whenever he was approached by the first defendant, further advance amounts have been paid, and when the substantial amount of Rs.12,00,000/- has been paid, then the readiness and willingness of the plaintiff cannot be questioned. In this case, the parties have fixed 15 months time and the logic thereof, cannot be questioned by the subsequent purchaser. As a matter of fact, P.W.1 only sought to explain the same, during the cross-examination, considering the fact that some plastering work has to be completed and for the first defendant to vacate and hand over the property, 15 months' time was fixed. The same cannot be put against the plaintiff. The learned Counsel, by filing an application, for receipt of additional documents, which are nothing but the pleadings, connected with the Insolvency proceedings, which was originally mentioned in the plaint itself, would submit that if the third defendant is a genuine purchaser, inspite of notice, and in spite of mentioning in the plaint, she would have been impleaded herself in the Insolvency Proceedings, which she has not done.



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6.3. As a matter of fact in the insolvency petition the first defendant has claimed that he has registered a General Power of Attorney by borrowing a sum of Rs.20,00,000/-, from the second defendant. Therefore, he would pray that the additional documents which are incontrovertible documents, should also be taken on file, and the plaintiff's suit for specific performance be decreed.

6.4. *Mr.J.Titus Enock*, learned Counsel appearing on behalf of the Power of Attorney holder would submit that the plaintiff is not a *bona-fide* person, and after selling the property in favour of the third defendant, he is now set up by the first defendant collusively. The first defendant had also filed Insolvency Proceedings. The third defendant was put into possession of the suit property which was to the knowledge of the plaintiff. If the plaintiff had entered into a sale agreement, and had paid a sum of Rs.12,00,000/-, the plaintiff would not have kept quiet, even after the third defendant was put in possession. The story about 15 months' time, is created, because of the belated filing of the suit so as to suit their convenience. Otherwise, if the sum of Rs.12,00,000 out of Rs.15,00,000/-, sale consideration was already paid, then, there was no other reason for



postponing the sale for a period of 15 months.

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6.5. Similarly, *Mr.Jeya Ganeshan*, learned Counsel appearing on behalf of the third defendant would submit that from the Power of Attorney and the Sale Deed, it would be clear that the third defendant is a *bonafide* purchaser. The learned Counsel taking this Court extensively through the cross-examination and other oral testimony of the witnesses would submit that it was not mentioned in the sale agreement about the incomplete construction. Again, P.W.1 had lied before the Court that he had no knowledge about the fact that the first defendant had mortgaged the property. Further, he would submit that P.W.1 has admitted that he did not make the balance sum of Rs.3,00,000/- for sale consideration ready or prepared a draft of the sale agreement, and therefore, he was not ready and willing to perform his part of the contract.

6.6. Upon being specifically questioned about the stamp paper used for the suit sale agreement, P.W.1 in the box had suddenly disowned the same by stating that he did not know about the same, and it is only the first defendant, who had come up with the stamp paper. He would submit that the plaintiff's side witnesses have been specifically cross-examined



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about the collusive nature of the transaction. He would submit that the third defendant, is also in possession and enjoyment of the property and had made further constructions in the property, which is to the knowledge of the plaintiff. Therefore, when the third defendant had purchased the property, *bonafidely*, the plaintiff is not entitled to the relief of specific performance.

6.7. In support of his contentions, the learned Counsel also relied upon the Judgment of the Hon'ble Supreme Court of India, in *Padmakumari and Ors., vs. Dasayyan and others*¹, more specifically relying on Paragraph No.23, to contend that he was a bonafide purchaser. The learned Counsel also relied upon the Judgment of the Hon'ble Supreme Court of India, in *Shenbagam and Ors. Vs. K.K.Rathinavel*², more specifically Paragraph No.14 to contend that at all times material, the plaintiff should have been ready and willing. The plaintiff has admitted that he did not take any steps, after the payment of the second installment of the sale consideration until the date of issue of the pre-suit notice.

G.Point for consideration :

¹ 2015 (6) CTC 545

² 2022 SCC OnLine SC 71



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7. I have considered the rival submissions made on either side and

perused the material records of this case. The point for consideration, in this case, is that:-

“i) Whether the plaintiff is entitled to the relief of specific performance of the suit sale agreement?”

7.1 It can be seen that the second defendant is only a Power of Attorney agent appointed by the first defendant for the sale of the suit property. The third defendant is only a subsequent purchaser. Therefore, it was neither in their knowledge, nor it will be open for them to contest about the details of the suit sale agreement. When D.W.1 remained *ex-parte* the matter has to be viewed from that *ex-parte* angle whether or not the plaintiff is entitled for a relief of specific performance. In the absence of denial by the first defendant, the agreement and payment of the advance amount to the tune of Rs.12,00,000/- has to be taken as correct, especially when P.W.1 has spoken about the same, and the sale agreement has been marked, and the attesting witnesses have been examined. Therefore, the only factor which has to be seen is that, in the plaint, it is categorically admitted by the plaintiff in Paragraph No.5 that the first defendant had represented to him at the time of entering into the contract itself that the property has been mortgaged by depositing original title deeds to one



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S.C.Manickkam for a sum of Rs.3,00,000/-. It is further admitted in the

plaint that only a photocopy of the sale deed alone was provided to the plaintiff. But, however, when P.W.1 was in the box, and in his cross-examination, he has stated that even though he found that there was a mortgage by perusing the encumbrance certificate, yet he did not know that it was by depositing the original deeds. Thereby he contradicts his own pleadings. Secondly, his case is that he gave a sum of Rs.7,00,000/- in advance, and the first defendant undertook to redeem the mortgage within three or four days. But, as per the plaint, the first defendant again came to the plaintiff and demanded another sum of Rs.5,00,000/-. In the normal circumstances, when the plaintiff had paid a sum of Rs.7,00,000/-, as advance amount, he would have insisted the first defendant to redeem the mortgage or even if he had not redeemed in the second instance at least, he would have personally accompanied the first defendant, to redeem the mortgage. But, however, strangely, he gave another sum of Rs.5,00,000/- and an endorsement was made for extending the contract for a further period of 15 months. Even thereafter, it is the case of the plaintiff that the first defendant redeemed the mortgage and he gave him only the cancelled mortgage deed, and he did not hand over the original title deed.

7.2 As a matter of fact, it is the case of the plaintiff that the first



defendant kept on evading by stating that he has misplaced the original deed. Even after such a conduct, the plaintiff had kept quiet for a period of 15 months, as per the endorsement. It is this aspect of the matter, which borders on the genuineness of the transaction, which is taken into account by the Trial Court in a different context, to hold that this suit agreement is not genuine. However, it would suffice to hold that all the above factors clearly portray that the plaintiff was not keen on proceeding further with the transaction and completing the transaction. Therefore, I conclude that the plaintiff is not ready and willing to complete the transaction, and therefore, cannot be granted the relief of specific performance.

7.3 At the same time, it is seen that the third defendant has paid only a sum of Rs.7,00,000/- as sale consideration. It is the contention of the learned Counsel for the appellant to look into the additional documents, since the relevant pleadings are there, in the original plaint itself, and the parties have admitted the pendency of the Insolvency Proceedings, and the documents are nothing but the pleadings before the Trial Court and the genuineness not being doubted, the additional documents produced by the appellant are taken on file and marked as ***Exs.A-14 to A-19***. On a perusal of the same, it is clear that the first defendant had mentioned in the



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proceedings that, he had borrowed a sum of Rs.20,00,000 from the second defendant and executed a Power of Attorney. It is also clear that the third defendant had not impleaded herself in the said Insolvency Proceedings, though it is stated across the bar, that the proceedings will likely to be concluded. Therefore, under the circumstances, i) Whether the sale in favour of the third defendant is *bona-fide* or not? ii) Whether the sale is sham and nominal ? iii) Whether the property was sold for Rs.7,00,000/- or towards a borrowal of Rs.20,00,000/-, from the second defendant? or Whether the first defendant being a dubious person, had set up both the plaintiff as well as the third defendant? are all the factors which can be gone into and only in the said Insolvency Proceedings once this Court finds that the plaintiff is not entitled to the relief of specific performance, and is only entitled to the alternate relief, only for the default of the first defendant, all other questions are left open, and the decision of the other questions are also not necessary for the Judgment in the present suit/Appeal Suit.

7.4 In view of my above findings, I find that the ultimate conclusion reached by the Trial Court, that the plaintiff is not entitled for the relief of specific performance and will be entitled for the alternative relief of refund



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of advance amount with interest need not be interfered. However, the findings of the Trial Court in the present suit will not in any manner affect the rights of the parties or any adjudication in the Insolvency Proceedings.

7.5 In view thereof, the findings of the Trial Court in respect of issue No.1 & 2, is answered by concluding that the plaintiff was not always ready and willing to perform the contract and therefore, the plaintiff is not entitled for specific performance. The plaintiff is therefore not entitled to get the relief of declaration in respect of the sale deed, as the said question, whether the sale is sham and nominal or not, becomes unnecessary, once the plaintiff is held to be not entitled for the relief of specific performance. For the same reasons, it cannot be concluded in the present proceedings as to whether the third defendant is a bonafide purchaser or not. As held by the Trial Court, only for the default of the first defendant to contest the matter, the plaintiff would be entitled for the sum of Rs.12,00,000/- along with interest as ordered by the Trial Court. But, this finding will not defeat the rights of any third party, who would like to contend otherwise in the Insolvency Proceedings, and this decree would be binding only qua the first defendant alone. For the same reasons, the plaintiff is not entitled for a charge over the suit property. The plaintiff is only granted with the relief of



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return of the advance amount as ordered by the Trial Court, with interest at the rate of 9% per annum, from the date of plaint, till the date of decree, and thereafter, with an interest at the rate of 6% per annum, till the date of realization. Therefore, the Judgment and Decree of the Trial Court does not need any interference.

H. The Result:

8. In the result :

- (i) The Appeal Suit in A.S.No.418 of 2016 is dismissed;
- (ii) There will be no order to costs;
- (iii) Consequently, the connected miscellaneous petition is closed.

19.12.2022

Index : yes
Speaking order

klt

To

- 1.The VII-Additional City Civil Court, Chennai.
- 2.The Section officer, Original side, High Court of Madras.

D.BHARATHA CHAKRAVARTHY, J.

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Pre-Delivery Judgment in

A.S.No.418 of 2016
and
C.M.P.No.16367 of 2022

19.12.2022